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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 847

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Respondent*

— —

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Brotherhood of Railroad Trainmen and Messrs. G. W. Black and R. E. Gardner, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the case of *Brotherhood of Railroad Trainmen, et al.* v. *Denver and Rio Grande Western Railroad Company* (Case No. 7651) on November 19, 1964, affirming a District Court judgment reducing the money portion of an award of the National Railroad Adjustment Board to a nominal amount. (Appendix A hereto.)

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, is not yet reported. The order and judgment of the District Court and the Findings of Fact and Conclusions of Law upon which that order was based are not reported. They appear at pages 36-47 of the record.

JURISDICTION

The judgment of the court of Appeals was entered on November 19, 1964. (Appendix A.)[1] The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Does the National Railroad Adjustment Board have authority under Section 3, First of the Railway Labor Act to sustain claims of railroad employees against their employer carrier for a day's pay on each day the carrier violated the collective bargaining agreement governing their rates of pay, rules, and working conditions by assigning them duties not permitted by the agreement, in circumstances where (a) the earnings of the employees were not reduced by the violation, (b) the rail carrier involved conceded a past practice of paying monetary claims of its employees pursuant to awards of the Board for violations of contract provisions in such situations, and (c) the Board has a long

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[1] The judgment appears on page 4 of the transcript of record transmitted by the Clerk of the Court of Appeals to this Court. The printed transcript of record of the case in the District Court, consisting of 109 pages, is incorporated by reference and made a part thereof on page 1 of the transcript of the record as certified.

established practice under such statute not repudiated by the Congress of sustaining claims for a day's pay for such violations?

STATUTES INVOLVED

The statutory provisions involved are Sections 3, First (i) through 3, First (q) of the Railway Labor Act (45 U.S.C.A., Sections 153, First (i) through 153, First (q)). They are printed in Appendix C hereto.

STATEMENT

This litigation had its origins in an action of the Denver and Rio Grande Western Railroad Company (hereinafter referred to as the "D&RGW") cancelling an existing freight service assignment between Provo-Eureka, Utah, and substituting therefor a new and different assignment without consultation, negotiation, or agreement with the Brotherhood of Railroad Trainmen (hereinafter referred to as the "Brotherhood"). The material facts concerning this action and the events flowing therefrom are undisputed and the subject of a stipulation between the parties. (R. 21-32.)[2] They are also set forth in the District Court's "Findings of Fact". (R. 36-44.) These facts are:

The Brotherhood of Railroad Trainmen is an unincorporated association of railroad employees and is the duly designated representative under the Railway Labor Act of brakemen in the employ of the D&RGW. The Brotherhood's headquarters and principal place of business is 1370 Ontario Street, Cleveland, Ohio. (R. 21, 36.)

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[2] Reference is to pages of the printed "Transcript of Record" in the Court of Appeals.

Petitioners Black and Gardner are and were at all times material employees of the railroad and members of the craft or class represented by the Brotherhood. (R. 21, 36.)

The D&RGW is a corporation organized under the laws of the State of Delaware and engages in interstate and intrastate common carrier operations by railroad. It owns and operates a railroad system extending from Denver, Colorado Springs, and Pueblo, Colorado, to Salt Lake City and Ogden, Utah, with numerous branches on these lines. Its principal operating office is located in Denver, Colorado. (R. 21, 36.)

At all times material, there has been in effect a collective bargaining agreement between the Brotherhood and the D&RGW, executed pursuant to the provisions of the Railway Labor Act, governing the rates of pay, rules, and working conditions of brakemen in the employ of the carrier. This agreement is identified as "Schedule of Agreement Covering Rates, Rules and Regulations for Trainmen". (R. 21, 36.)

Article 5(c) of the collective bargaining agreement referred to above contained a tabulation of mixed and miscellaneous freight service assignments. Among these assignments written into the agreement was the "Provo-Eureka" run, between two cities by those names within the State of Utah. This tabulated assignment read as follows in said Article:

"Rates of Pay—Freight Service

(c) Mixed and Miscellaneous Service Trainmen

	Per Mile Cents	Per Day Dollars
* * * *		
Provo-Eureka	13.39	13.39

Assigned crew—
Working day month."

Effective April 1, 1952, the above rates became 14.19 cents and $14.19, respectively, and effective July 1, 1952, the rates became 14.35 cents and $14.35, respectively. (R. 21, 22, 37.)

Note 2 of this Article read as follows: (R. 22, 37)

> "The rates shown in Paragraphs (b) and (c) apply to assigned crews and include the local differentials. Pool crews, if used, will be paid through freight rates with differential of 40¢ for trainmen per 100 miles of less, if local work as defined in the conversion rule (Paragraph (d) of this article) is performed."

Prior to March 6, 1952, Messrs. Black and Gardner were in assigned service as a train crew on the Provo-Eureka run with Provo the home terminal and Eureka the away-from-home terminal. The crew operated out of Provo on Mondays, Wednesdays and Fridays. On Tuesdays, Thursdays and Saturdays the crew operated out of Eureka to Provo. (R. 22.)

On March 6, 1952, Mr. E. B. Herdman, Manager of Personnel of the D&RGW, notified Mr. R. E. Carroll, General Chairman of the General Grievance Committee of various local lodges of the Brotherhood with members employed by the D&RGW, that the carrier intended in the latter part of June to cancel the existing straight-away assignment between Provo and Eureka and inaugurate a new turn-around freight assignment with limits Provo and Springville on the main line, Eureka on the Tintic Branch and Dividend on the Goshen Valley Branch, 6 days per week assignment, only terminal and Sunday layover at Provo. The effect of the proposed action was to require the crew, when runs were made all the way to Eureka on the new turn-around assignment, to work both ways over terri-

tory on one day that had been covered in two days under the discontinued straight-away assignment. The proposed assignment did not require that runs be made all the way to Eureka every day, though the entire trip would be made when deemed necessary by the railroad. The conversion by the railroad to new diesel engines made the proposed assignment feasible. (R. 22, 23, 37-39.)

On May 19, 1952, the D&RGW posted a bulletin, identified as Circular No. 62, signed by Mr. G. B. Aydelott, Superintendent of the carrier's Salt Lake Division, stating that bids would be received for Conductor, Rear and Head Trainmen "for new freight assignment in turn-around service" on the Tintic Branch until 12:01 p.m. May 24, 1952.

On May 23, 1952, the Brotherhood protested the railroad's proposed change of the existing Provo-Eureka assignment on the grounds that (1) the D&RGW did not have the right to change the assignment under Article 64 of the collective bargaining agreement without notice to and negotiation with the Brotherhood, and (2) the proposal also constituted a change in working conditions in violation of the moratorium provision in Article 13 of the so-called National Settlement of May 25, 1951, which was incorporated in said collective bargaining agreement. (R. 25, 39, 40.)[3]

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[3] Article 13 of the so-called National Settlement of May 25, 1951 moratorium agreement), read as follows:

> "No proposals for changes in rates of pay, rules or working conditions shall be initiated or progressed by the employees against any carrier or by any carrier against its employees, parties hereto, within a period of three years from October 1, 1950, except such proposals for changes in rules and working conditions which may have been initiated prior to June 1, 1950 . . ."

Article 64 of the collective bargaining agreement between the Brotherhood and the D&RGW read as follows: (R. 40, 96)

"ARTICLE 64
"ESTABLISHING NEW RUNS

"The Company is not prohibited by any Article or provision of this Agreement from establishing new runs, or new assignments. Notices called for bids on any new run or new assignment must state definite limits and must show number of days per week (6 or 7) to be worked and time crew will go on duty.

"Rates of pay for any new run or new assignment will be in accordance with rates for similar assignments on the same Sub-Division. If no similar assignment on the same Sub-Division, rates of pay will be a matter of negotiation between the designated General Officer and General Chairman of the Brotherhood of Railroad Trainmen.

"NOTE: Time for crews to go on duty will not be changed without at least 40 hours' notice. When time to go on duty is changed one (1) hour or more the assignment will be rebulletined."

The D&RGW advised the Brotherhood that the new assignment was established in accordance with Article 64 and that Article 13 of the National Settlement was not involved. Accordingly, it cancelled the Provo-Eureka straight-away assignment and established the new Provo-Eureka limits turn-around run, as set forth in Mr. Herdman's letter of March 6, 1952, without negotiation with and the consent of the Brotherhood concerning such assignment and rates of pay, rules, or working conditions to be applied thereto. (R. 26, 41.)

Thereafter, employees affected filed claims for a day's pay for days on which they were required to

perform the new assignment. The Brotherhood processed the claims on the property in the usual manner up to and including the chief operating officer of the respondent carrier designated to handle such disputes in accordance with the provisions of Section 3, First (i) of the Railway Labor Act, and they were denied by the carrier.

The same number of employees were required to operate the turn-around run as were required for the old straight-away assignment. The employees engaged in the changed assignment were paid the same rate of pay by the carrier as was paid for the old straight-away assignment. The earnings of such employees were not reduced by the change in assignment. Petitioners Black and Gardner were among the employees engaged in the operation. (R. 24, 25, 39, 43.)

On February 3, 1953, the Brotherhood submitted the dispute to the First Division of the National Railroad Adjustment Board on behalf of Messrs. Black and Gardner, alleging violations of Article 64 of the 1952 collective bargaining agreement and Article 13 of the 1951 National Settlement. The National Railroad Adjustment Board was established by Section 3 of the Railway Labor Act (45 U.S.C.A., Section 153) to hear and determine disputes between an employee or groups of employees and a railroad or railroads growing out of grievances or out of the interpretation or application of collective bargaining agreements. The First Division of this Board had jurisdiction over disputes involving the craft or class of employees to which the employees involved belong. (R. 28, 29, 43.)

On December 17, 1959, the Adjustment Board issued its Award No. 19372 sustaining the claims on the

ground that Article 64 of the collective bargaining agreement, as interpreted and applied over many years, did not permit the change in assignment without negotiation with the Brotherhood. The decision was written by Referee Sembower who had been selected as neutral referee by the National Mediation Board pursuant to Section 3, First (l) of the Railway Labor Act (45 U.S.C.A., Section 153, First (l)), the five carrier members and the five labor members of the First Division being equally divided as to the merits of the dispute. On the same date, the Board issued an order directing the D&RGW to comply with the award. (R. 30, 31, 43.)

The D&RGW refused to comply with the money award therein. Moreover, the D&RGW did nothing with respect to the contract violation found by the Adjustment Board. However, by virtue of a settlement between the railroad and the Brotherhood reached in 1960, claims are no longer accruing. (R. 31, 43.)

Under Award No. 19372, and the accompanying order of the Adjustment Board, G. W. Black was entitled to 9 days' pay and R. E. Gardner to 139 days' pay. A total of 314 claims for a day's pay were duly filed by various employees of the D&RGW based on the carrier's action, which it was required to pay under Award No. 19372. (R. 31, 43.)

When the D&RGW refused to comply with the award of the Adjustment Board, the Brotherhood called a strike against the D&RGW to obtain compliance. This strike was enjoined by the District Court on the ground that the exclusive means for the enforcement of awards of the National Railroad Adjustment Board was by a suit in an appropriate Federal District Court pursuant to the provisions of Section

3, First (p) of the Railway Labor Act (45 U.S.C.A., Section 153, First (p)). *Denver and Rio Grande Western Railroad Company* v. *Brotherhood of Railroad Trainmen, et al.*, 185 F. Supp. 369 (1960). Such injunction was affirmed by the Court of Appeals. *Brotherhood of Railroad Trainmen, et al.* v. *Denver and Rio Grande Western Railroad Company*, 290 F.2d 266 (1961), *cert. den.* 366 U.S. 966 (1961).[4]

Thereafter, the Brotherhood and Messrs. Black and Gardner filed a petition in the District Court to enforce the award pursuant to Sections 3, First (p) and (q) of the Railway Labor Act (45 U.S.C.A., Sections 153, First (p) and (q)). (R. 1-8.) The petition was filed on behalf of the brakemen employees of the D&RGW for whose benefit the Adjustment Board award and the accompanying order of the Board were made. (R. 17.)

The case was tried before the District Court sitting without a jury pursuant to a waiver of a jury trial by the parties. (R. 36.)

On September 3, 1963, the District Court entered its "Findings of Fact", which appear at R. 36-44, and its "Conclusions of Law". The latter read as follows: (R. 44)

> "1. This Court has jurisdiction over the parties and the subject matter of the action. The national Railway Adjustment Board, First Division, previously had jurisdiction over this dispute.
>
> "2. The action of the carrier in cancelling the Provo-Eureka straight-away assignment and rearranging it to be operated as a turn-around run,

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[4] Subsequently, this Court reached the same conclusion in another case. *Brotherhood of Locomotive Engineers, et al.* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33 (1963).

pursuant to the carrier's letter of March 6, 1952, constitute a violation of Article 64 of the effective collective bargaining agreement between the parties.

"3. Article 13 of the National Settlement of May 25, 1951, which prohibits a carrier from proposing changes in an agreement affecting rates of pay, rules, or working conditions until May 25, 1954, was not violated by the carrier's action.

"4. Since the collective bargaining agreement contains no provisions for punitive damages for contractual violations such as that found in this case, damages, if any, must be assessed on the basis of ordinary contract law. Petitioners here have not been damaged monetarily by the contractual violation, and they are, consequently, under well-settled principles of contract law, entitled to no more than nominal damages. The award of the Railroad Adjustment Board, insofar as it awards damages of one day's pay for each date for which a claim was filed is erroneous, and the award of damages predicated upon that basis must be set aside.

"5. Individual petitioners and other employees of respondent carrier who filed claims based on the contract violation involved are entitled to nominal damages in the amount of one dollar ($1.00) per day for each claim filed."

On November 1, 1963, the District Court entered its final judgment and order in accordance with such findings and conclusions. (R. 47.) This order affirmed the Adjustment Board's interpretation of the collective bargaining agreement and directed the D&RGW to pay to 29 employees of the D&RGW the total sum of $509. Paragraph 4 of this order provided that it should constitute a final judgment on all issues of the case with the exception of the taxing of costs on

the filing of a bill of costs and petitioners' claim pursuant to Section 3, First (p) of the Railway Labor Act for an assessment of attorney's fees against the D&RGW as a part of such costs. (R. 46.)

On November 8, 1963, the District Court entered a supplemental judgment and order decreeing that petitioners should have judgment against the D&RGW in the sum of $1,750 as a reasonable attorney's fee to be taxed and collected as a part of the costs in the suit. (R. 47.)

Petitioners appealed to the Court of Appeals that portion of the District Court's order and judgment of November 1, 1963, reducing the amount of the Adjustment Board's monetary award in favor of the employees. (R. 47.) This appeal was designated as Case No. 7651 in the Court of Appeals. The D&RGW cross-appealed that portion of the District Court's judgment and order affirming the Adjustment Board's interpretation and application of the collective bargaining agreement between the D&RGW and the Brotherhood. (R. 48.) The cross-appeal was designated as Case No. 7652.

The judgment of the Court of Appeals affirmed the order and judgment of the District Court on both the appeal and the cross-appeal. (Appendix A hereto.)

In that portion of its opinion dealing with the amount of the monetary award here involved (Case No. 7651), the Court of Appeals held (1) that the District Court correctly determined that the case was governed by the general law of damages relating to contracts; (2) that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he, in

fact, earned; (3) that the collective bargaining agreement involved did not contain a provision for liquidated damages or punitive provisions for technical violations; and (4) that the National Railroad Adjustment Board has no power under the Railway Labor Act to employ sanctions. (Appendix B hereto, pages 5a-6a.)

In addition, the Court of Appeals observed that with respect to the Brotherhood's contention of a practice within the railroad industry to award a day's pay to employees for contract violations in the situation here involved, the District Court made no finding of such a practice nor was such a finding requested in the proceedings before the Board or the District Court.

REASONS FOR GRANTING WRIT

I.

The Petition Presents for Review An Important Question of Interpretation of the Power of the National Railroad Adjustment Board Under the Railway Labor Act

In the present case the National Railroad Adjustment Board sustained the claim of railroad employees for a day's pay for the days on which the respondent carrier violated the collective bargaining agreement governing employees' rates of pay, rules, and working conditions by requiring them to perform an assignment which had been unilaterally imposed by the carrier rather than negotiated as the agreement required. Although the violation did not result in a reduction in the rate of pay of the employees, such violation deprived their collective bargaining representative, the Brotherhood, of the opportunity of negotiating a higher rate of pay and different rules and working conditions for the changed assignment as were ultimately negotiated when the railroad undertook such negotia-

tions following the issuance of Award No. 19372 so that new claims could not accrue. (R. 31, 96, 97.) In addition, under the changed assignment, the railroad was free, whenever it desired, to require the employees to operate from Provo to Eureka and back in one day whereas under the contract assignment they could only be required to operate between Provo and Eureka in a day. Thus, although the contract violation did not reduce the existing rate of pay, it did produce legal injury to the employees. The decision of the Court of Appeals holds that the National Railroad Adjustment Board does not have authority in such a situation to sustain a claim for a day's pay for the days on which the violation took place in the absence of a specific provision in the collective bargaining agreement for liquidated damages. It reaches such a conclusion by finding that there is nothing in the Railway Labor Act which authorizes the Board to sustain such claims and that the amount of the award must be governed by common law principles. The question thus presented goes to the heart of the functions of the National Railroad Adjustment Board. That Board's authority under the Railway Labor Act should not be so limited without review by this Court.

The need for such review is particularly emphasized by reason of the fact that the decisions of this Court have established that Section 3 of the Railway Labor Act provides a system of compulsory arbitration for the determination of grievances of railroad employees and for the resolution of disputes growing out of the interpretation and application of collective bargaining agreements so that such employees must resort to the National Railroad Adjustment Board for a decision on their grievances and are precluded from thereafter

striking when carriers refuse to honor the Board's awards, as in this case. *Brotherhood of Railroad Trainmen, et al.* v. *Chicago River & Indiana Railroad Company, et al.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers, et al.* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33 (1963). Under these circumstances, the authority of the Board in performing its duties should not be whittled away without review by this Court. In addition, the decision of the Court of Appeals here involved adds one more element to the basic structure of unfairness to railroad employees that has been built up with respect to the application of Section 3 of the Railway Labor Act. Not only must the employees utilize the procedures of Section 3 and thereafter be prohibited from withdrawing their services in situations where they obtain a favorable award by the National Railroad Adjustment Board, which a carrier refuses to accept, but they are also faced with the situation that where they lose before that Board they have no other recourse, while the carrier involved may force them into additional long costly litigation. *Pennsylvania Railroad Company* v. *Day*, 360 U.S. 548 (1959).

The decision below further adds to the employee's burdens and to the unbalanced structure of Section 3 by limiting the authority of the Board to render the employee justice in the face of flagrant and deliberate violations of his collective bargaining agreement by applying strict common law rules to the actions of the National Railroad Adjustment Board. Moreover, this additional obstacle to the employee is thrown up in the face of decisions of this Court that rights under collective bargaining agreements are not to be determined upon the basis of principles of law governing ordinary

contracts because such agreements call "into being a new common law—the common law of a particular industry or of a particular plant". *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 578, 579 (1960); *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543, 550 (1964). The common law of the railroad industry, which has been developed by the National Railroad Adjustment Board, is the award of a day's pay to employees who are required to perform services lying outside of their assigned duties under their collective bargaining agreement even though the agreement does not contain any express rule for liquidated damages.

The existence of such a long-established principle of action by the Board is set forth by the First Division of the Adjustment Board in its Award No. 19258, dated July 6, 1959 (Vol. 141 of First Division Reports, page 472), in which the Board sustained a claim of an engineer for a full day's pay in addition to his regular pay for a period of three days when he was required to operate his locomotive across a turntable in violation of the applicable collective bargaining agreement. At page 477, the Adjustment Board stated as follows with respect to this long-standing custom and usage:[5]

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[5] The correctness of the Adjustment Board's statement in Award No. 19258 as to the long-established nature of this custom and usage is borne out by reference to the prior Adjustment Board Awards cited therein. Thus, in Award No. 3901, dated July 13, 1939 (Vol. XXII of the First Division Reports, page 526), the Board sustained a claim for a day's pay for a fireman of the Nashville, Chattanooga & St. Louis Railroad who was required in violation of his collective bargaining agreement to draw fire from his engine at the end of a trip; in Award No. 12665, dated February 24, 1949 (Vol. 84 of First Division Reports, page 314), the Board awarded an additional day's pay to a fireman of the New York Central who was required to handle switches; in Award No. 13334, dated March

"Starting with this Division's Award 3901, decided without a Referee, wherein claims of firemen were sustained when they were required after road trips to draw fire which formerly had been drawn by watchmen who had been discontinued, the Division, as it pointed out in Award 17600, Referee Mortimer Stone assisting, has held 'that in the absence of a specific payment rule the basic day rule applies to compensation of an employe where in violation of express rule he is required to perform service lying outside his assigned duties and belonging to another craft.' See also Awards 11865 (involving a claim by an engineer for being required to handle a gas-electric motorcar out of the roundhouse over the turntable prior to departure), 12665, 13334, 13369, 14607, 15419, 15908, and 16887."

Award No. 17600, dated August 2, 1956 (Vol. 126 of First Division Reports, page 823), from which the

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20, 1950 (Vol. 89 of First Division Reports, page 759), the Board awarded a day's pay to a fireman of the St. Louis-San Francisco Railway required to perform switching duties of a hosteler-helper; in Award No. 13367, dated March 28, 1950 (Vol. 90 of First Division Reports, page 164), the Board awarded a day's pay to a fireman of the Chicago, St. Paul, Minneapolis & Omaha required to watch his locomotive in violation of the agreement; in Award No. 14607, dated June 29, 1951 (Vol. 100 of First Division Reports, page 121), the Board awarded a day's pay to conductors of the Kansas City Southern Railway required to make yard checks; in Award No. 15419, dated May 15, 1952 (Vol. 106 of First Division Reports, page 599), the Board awarded a day's pay to an engineer of the Atchison, Topeka & Santa Fe Railroad required to move his locomotive across a turntable; in Award No. 15908, dated December 11, 1952 (Vol. 110 of First Division Reports, page 629), the Board awarded a day's pay to an employee of the Lehigh Valley required to perform yard helper checker duties outside of his regular assignment; in Award No. 16887, dated January 7, 1955 (Vol. 120 of First Division Reports, page 564), the Board awarded a day's pay to a fireman of the Chicago & North Western Railway required to take on coal outside of his assigned duties.

Adjustment Board quoted, sustained the claims of trainmen of the Delaware, Lackawanna & Western Railway for a day's pay in addition to their regular pay for work in coupling and uncoupling air hoses and electric jumpers on trains on which they served as train crews in violation of their collective bargaining agreement. At page 830, the Adjustment Board made the following statement concerning the established practice of compensating employees a full day's pay for such violations, where no other rule of compensation was provided in the agreement:

> "It has been held by a long line of awards that in the absence of a specific payment rule the basic day rule applies to compensation of an employee where in violation of express rule he is required to perform service lying outside his assigned duties and belonging to another craft."

The application of this principle to a situation precisely like that here involved is illustrated by Award No. 16961, dated May 8, 1955 (Vol. 121 of First Division Reports, page 250), involving claims of the Brotherhood on behalf of trainmen of the Kansas City Southern Railway for violating the collective bargaining agreement by operating trains of excess tonnage. In that case, the carrier argued, as has the D&RGW here, that although it had violated the collective bargaining agreement it should not be required to pay the claims of a day's pay because the employees had suffered no loss. This position of the Kansas City Southern was set forth by the Adjustment Board at pages 262-263 of its Award as follows:

> "Carrier takes the position that admittedly it did violate the agreement but the train crew is not entitled to pay for such violation since the crew was paid for work it performed and has suffered no loss whatever as a result of the violation. Car-

> rier further contends there is no provision in the agreement which would allow for such additional pay as claimed, which in effect would be a penalty for such violation."

In short, the carrier's arguments in that case were identical with those advanced by the D&RGW in the present case.

The Adjustment Board rejected the carrier's contention that the award of a full day's pay under the circumstances would impose a penalty on the carrier. The Board pointed out (page 263) that the Award simply involved an application of a well-established principle in the interpretation of railroad collective bargaining agreements.

Finally, the principle here involved has been applied on numerous occasions by the Adjustment Board in sustaining prior claims for a full day's pay by employees of the D&RGW arising out of violations of Article 64 by that carrier. (Awards Nos. 2310, 2311, 2312, 2352, 2603, 2604, 2606, and 2607).[6] All of these awards were paid by the D&RGW.

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[6] These Awards are all cited by the Adjustment Board in the present Award (R. 91, 92). The specific nature of the violations involved is as follows:

In Award No. 2310 involved the cancellation of a tabulated assignment and the use of a local crew to perform the service; Award 2311 involved the discontinuance of a coal mine tabulated assignment and the establishment of a new run; Award 2312 involved a cancellation of a tabulated assignment and the substitution of a pool freight crew in lieu thereof; Award 2352 involved the use of an assigned crew to perform switching; Award 2603 involved the cancellation of a daily assigned service on two branches and the substitution of an assigned crew to operate each branch on alternate days; Award 2604 involved the combining of two tabulated assignments; Award 2606 involved the abolition of a tabulated assignment and the substitution therefor of a different assignment; Award 2607 involved the combining crews in a turnaround service.

The rationale of these Adjustment Board decisions was set forth in the early days of the Board in Award No. 3122 of the First Division, dated October 24, 1938, involving claims of railroad engineers against The Yazoo and Mississippi Valley Railroad Company, Vol. XVII, First Division Reports, page 689. That case involved the claims of engineers who were required to perform terminal service after their arrival at Vicksburg, Mississippi. The engineers operated regularly scheduled passenger trains between New Orleans and Vicksburg. The particular complainant went on duty at New Orleans at 6:40 a.m. and arrived at the passenger station in Vicksburg at 2:35 p.m. He went off duty at 3:35 p.m., after performing various terminal duties. He received pay for 240 miles and one hour's final terminal delay, less the amount earned by mileage between the station and the roundhouse, or the equivalant of 51 minutes' final terminal delay. The claim was for an additional day's pay at the yard rate. The Board sustained the claim, stating: (pages 698-699)

> "As stated in Award No. 3110 this Division has held scores of times, in substance, that, in the absence of schedule or special agreement, road and yard work may not be combined in one assignment without incurring liability:
>
> (a) to the men performing the work, for a minimum day in each capacity; and
>
> (b) to men available but not used, entitled by seniority to the work and denied the right to perform it, the attendant pay of the work.
>
> "The matter is one of much gravity because a failure to recognize or observe the principles involved may and has resulted in requiring payment of two extra days pay for a few minutes work, i.e., to the man who performs it, one day for his regular work

and an extra minimum day for the additional work and a minimum day to the man denied the work.

"The reasons are simple; as to the first man (the one who performed the work) the schedules contain separate articles governing road and yard work and as to each a basic day is provided of eight hours or less, 100 miles or less, etc. Consequently if either a road or yard man does fifteen minutes yard work and that is all there is of it for him to do, he is entitled to a minimum day for it although before or after doing it he may earn a day or more at road work. It is not correct to refer to it as a penalty; it is simply literal compliance with the express terms of the contract. As to the second man, i.e., the one denied the work; it is universally recognized that, if by virtue of his seniority rights—and they too are a part of the contract—he is entitled to perform certain work and that privilege is denied him and the work turned over to another, he should be compensated for his availability the same as though he had performed the work; and that likewise is not a penalty but merely the carrying out of the contract. Some schedules contain specific provisions as to what the compensation shall be, less than a full day, as to example run-around rules allowing fifty miles (half a day) and the right to stand first out, but, when the schedule is silent as to what the compensation shall be, the only basis available is the minimum day rule. This Division has so decided in many cases.

"Most of these cases are the results of efforts to economize which failed to envision all the considerations involved. The effect of the decisions of the Board is not that by the agreements the economies designed are insuperably rendered incapable of effectuation; it is merely that they cannot be effected by unilateral action without entailing the consequences indicated. In many cases such results are being achieved through mutual agreement."

This principle of the National Railroad Adjustment Board was recognized by a United States District Court in the decision in *Shipley* v. *Pittsburgh & Lake Erie R. Co.*, 83 F. Supp. 722 (W.D. Penna., 1949). In that case, the Court spoke as follows: (page 751)

> "I believe that a custom or usage did exist among railroads generally, and more particularly the defendant's railroad, for some time prior to 1928 and continuing to the present date, that when an employee did work outside of his craft or *his regular assigned duties,* he was entitled to an extra or an additional day's pay if the contract under which he worked carried no provision as to the arbitrary or compensation to be paid, unless the intent and understanding of the parties was that no compensation would be paid." (Emphasis supplied.)[7]

Finally, the respondent carrier itself has recognized this principle by paying the claims of its employees pursuant to awards of the National Railroad Adjustment Board for violations of contract provisions in situations where the earnings of said employees were not reduced by reason of such claimed violations. (R. 31.)

It is respectfully submitted that the decision of the Court of Appeals limiting the authority of the National Railroad Adjustment Board under the Railway Labor Act is contrary to long established procedures and prin-

---

[7] In the *Shipley* case, the Federal court did not award an additional day's pay to the employees there involved because it found that the duties performed, i.e., the coupling of air hoses, was the duty of both trainmen and car inspectors and had been so recognized by the parties over a period of years. It, therefore, concluded (page 752) that it was not the intention of the parties that an extra day's pay be paid to trainmen for the coupling of air hoses.

ciples of that Board and to admitted practices of the respondent carrier in the application of awards of that Board. It also leaves carriers free to violate their contracts with impunity.

II.

The Decision of the Court of Appeals Is Erroneous

1. The decision of the Court of Appeals is erroneous because it applies strict common law rules to actions of the National Railroad Adjustment Board in sustaining employee claims for violations of a collective bargaining agreement and this Court has recognized that the collective bargaining agreement creates a common law of its own. *United Steelworkers of America* v. *Warrior & Gulf Navigation Company, supra; John Wiley & Sons, Inc.* v. *Litigation, supra.*

2. The decision is not supported by reference to the language of Section 3 of the Railway Labor Act. That section confers broad authority upon the National Railroad Adjustment Board to hear and determine railroad employee grievances or disputes between employees and carriers involving the interpretation and application of collective bargaining agreements. The language of the statute contains no such limitations as have been imposed upon the Board by the decision below.

3. The decision below is contrary to the concept of the National Railroad Adjustment Board as a Board created to provide a system of expert compulsory arbitration for the settlement of employee grievances and disputes concerning the interpretation and application of collective bargaining agreements.

In *Slocum* v. *Delaware, Lackawanna & Western Railroad Company*, 339 U.S. 239 (1950), this Court, in

holding that the National Railroad Adjustment Board was the exclusive forum to hear and determine grievances of railroad employees and disputes between employees and rail carriers concerning the interpretation and application of collective bargaining agreements, spoke of the Board and Section 3 of the Railway Labor Act as follows: (pages 242-244)

> "In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the [May 20,] 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers. 44 Stat. 577, 578, ch 347. But this voluntary machinery proved unsatisfactory, and in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board composed of representatives of railroads and unions. 48 Stat. 1189-1193, ch 691. The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.

"The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in Order of R. Conductors v. Pitney, 326 US 561, 90 L ed 318, 66 S Ct 322, supra. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents . . . .' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 US at 567, 568. This reason equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act."

In *Brotherhood of Railroad Trainmen, et al.* v. *Chicago River & Indiana Railroad Company, et al.*, 353 U.S. 30 (1957), this Court described the procedure of Section 3 of the Railway Labor Act as establishing a system of compulsory arbitration in this limited field. (Page 39.) In *Brotherhood of Locomotive Engineers, et al.* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33 (1963), this Court spoke as follows of its decision interpreting Section 3 of the Railway Labor Act: (page 38)

"The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes."

In its opinion in the *Louisville and Nashville* case, this Court also referred to the decision in the *Chicago River* case, and spoke as follows: (page 39)

> "In an opinion which reviewed at length the legislative history of the 1934 amendments, the Court concluded that this history entirely supported the plain import of the statutory language—that Congress had intended the grievance procedures of § 3 First to be a compulsory substitute for economic self-help, not merely a voluntary alternative to it."

The concept of a system of compulsory arbitration has been seriously impaired already by the interpretation of the statute as authorizing determinations that are final and binding on the employee but which are not final and binding on the carrier. The holding by the Court below that the National Railroad Adjustment Board is governed by strict common law principles in its determinations destroys the last vestige of the concept of a system of final and binding determinations by experienced experts in the field of railroad labor relations rendering determinations on employee grievances as a substitute for self-help. In fact, the employee is clearly much worse off than he would be if he could resort to self-help and he is also worse off than he would be if he could simply bring a suit in an appropriate court instead of having to spend years litigating his grievance before the National Railroad Adjustment Board and then to have the determinations of that expert body reviewed and reversed by the Federal courts on the ground that the Board must apply strict common law principles.

4. The Court of Appeals erred with respect to its holding that even on the basis of strict common law

principles the award of the Adjustment Board, insofar as it related to the monetary claim, should be set aside. Such decision fails to give proper recognition to the general legal principle that parties who contract on a subject matter concerning which known usages prevail incorporate such usages by implication in their agreements if nothing is said to the contrary. *Hostetter* v. *Park*, 137 U.S. 30, 40; *Pacific Grape Products Co.* v. *Commissioner of Internal Revenue*, 219 F. 2d 862, 866-867 (9th Cir., 1955); *Murphy* v. *Warner Bros. Pictures*, 112 F. 2d 746, 748 (9th Cir., 1940); *Dixon, Irmaos & CIA, Ltda.* v. *Chase National Bank of City of New York*, 144 F. 2d 759, 762 (2nd Cir., 1944); *C. M. McMahen & Sons* v. *Louisville & Nashville R. Co.*, 16 F. 2d 698, 699 (5th Cir., 1927); *Kurlan* v. *Tirrell Bros. Silk Corp.*, 102 F. Supp. 970, 971 (D.C.S.D. New York, 1952); *Shipley* v. *Pittsburg & Lake Erie R. Co.*, 83 F. Supp. 722, 750 (D.C.W.D. Penna., 1949); *Flour Mills of America* v. *United States*, 72 F. Supp. 603, 607 (Ct. of Claims, 1947).

The decision below suggests that a practice in the railroad industry by which a day's pay would be paid for contract violations such as are here involved was not established by finding nor requested as a finding in the proceedings before the Board or the District Court. However, in the proceedings before the Adjustment Board, the respondent carrier, while contending that there had been no contract violation, did not raise any question with respect to the power of the National Railroad Adjustment Board to award a full day's pay if it did find a contract violation. (R. 68-92.) This failure to raise the issue involved before the administrative agency would, in ordinary administrative practice, preclude a subsequent judicial decision based upon

such issue. Certainly, this administrative principle should not now be distorted to the advantage of the respondent carrier to support a reversal of the Board's award on the absence of a finding by the Board on an issue not raised by the carrier, whose obligation it was to raise it. The fact that the District Court did not make a finding is of no significance. This failure was specifically raised by the petitioners as one of the bases of their appeal from the District Court's decision. (R. 49.) Finally, the existence of this practice in the railroad industry is not a matter of evidence and testimony, but arises out of the decisions of the National Railroad Adjustment Board, cited above, and the recognition by the respondent carrier in its past practice of the validity of such decisions which is a matter of record. (R. 31.)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 19, 1965

APPENDIX A

Judgment of the United States Court of Appeals for the Tenth Circuit:

JUDGMENT

Fourth Day, November Term, Thursday, November 19th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips, and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and were argued by counsel.

On consideration whereof, it is now here ordered by the court that the judgment of the said district court in these causes be and the same is hereby affirmed. Each party shall bear its own costs.

APPENDIX B

(Filed November 19, 1964)

Opinion

UNITED STATES COURT OF APPEALS TENTH CIRCUIT
NOVEMBER TERM, 1964

Nos. 7651 and 7652

BROTHERHOOD OF RAILROAD TRAINMEN, G. W. BLACK AND R. E. GARDNER, *Appellants and Cross-Appellees,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Appellee and Cross-Appellant.*

Appeal from the United States District Court for the District of Colorado

James L. Highsaw, Jr., Washington, D. C., (Philip Hornbein, Jr., Denver, Colorado, and Hornbein & Hornbein, Denver, Colorado, and Mulholland, Hickey & Lyman, Washington, D. C., Of Counsel, on the brief) for Appellants and Cross-Appellees.

Walter J. Cummings, Jr., Chicago, Illinois, (T. A. White and Kenneth D. Barrows, Denver, Colorado, and Ray Garrett, Chicago, Illinois, and Sidley, Austin, Burgess & Smith, Chicago, Illinois, Of Counsel, on the brief) for Appellee and Cross-Appellant.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This is an action brought under Section 3 First (p) of the Railway Labor Act, U.S.C. § 125 First (p), to enforce an order of the National Railroad Adjustment Board, First Division. The Board order determined that the appellee railroad had violated its collective bargaining agreement

with the appellant Brotherhood and granted an award to the individual appellants, as employees of the railroad and members of the craft represented by the Brotherhood, of one day's full pay for each claim filed. The cause was submitted to the District Court upon stipulated facts. That court held that the Board had correctly determined that the railroad had breached its bargaining agreement but had incorrectly determined the amount of the allowable award. Judgment in the District Court was entered in favor of the individual claimants for nominal damages of one dollar per day for each claim. By cross appeals the parties assert error in the portion of the judgment that is adverse to their respective interests.

The undisputed pertinent facts may be summarized. Prior to March 6, 1952, the railroad operated a forty-five mile straight-away run between terminals located at Provo and Eureka, Utah. On March 6 the railroad notified the Brotherhood that the run would be changed from a straight-away to a daily turnaround run operating over the same line. As a result, the crew would return each evening to the home terminal, Provo, rather than every other evening. The change required the same number of crew members, called for the same rate of pay, and maintained the same length of assignment, six days per week. The Brotherhood protested the unilateral action of the railroad in effectuating the change, asserting it to be subject to negotiation under the provisions of Article 64 of the collective bargaining agreement; the railroad contended that such interpretation of Article 64 was incorrect. Article 64 provides:

"Establishing New Runs

"The Company is not prohibited by any Article or provision of this Agreement from establishing new runs, or new assignments. Notices calling for bids on any new run or new assignment must state definite

limits and must show number of days per week (6 or 7) to be worked and time crew will go on duty.

"Rates of pay for any new run or new assignment will be in accordance with rates for similar assignments on the same Sub-Division. If no similar assignment on the same Sub-Division, rate of pay will be a matter of negotiation between the designated General Officer and General Chairman of the Brotherhood of Railroad Trainmen.

"Note: Time for crews to go on duty will not be changed without at least 48 hours' notice. When time to go on duty is changed one (1) hour or more the assignment will be rebulletined."

In interpreting Article 64 both the Board and the District Court concluded that the railroad had violated its terms. We hold that such determination is within the bounds of reasonableness and consequently not in error. Article 64 became part of the collective bargaining agreement in 1945, prior to which the agreement had specifically required the railroad to negotiate new runs. By Board decision and by practice this earlier provision had been interpreted and applied as highly restrictive upon the right of the railroad to change tabulated assignments or working conditions without negotiation. In bargaining for the 1945 contract the railroad proposed a revision of the provisions of Article 64, the pertinent part of such proposal reading:

"Establishing New Runs—Freight or Mixed Service

"The Company is not prohibited by any article or provision of this Agreement from establishing new runs, or new assignments, or from discontinuing or re-arranging old assignments. Notices calling for bids on any new run, new assignment or re-arrangement of an old assignment must state definite limits and must show number of days per week (6 or 7) to be worked.

"Rates of pay for any new run, new assignment or change in old assignment will be in accordance with

> similar rates for similar assignments on the same subdivision. If no similar assignment on the same subdivision, rates of pay will be through freight rates (plus conversion rates if local work as defined in Conversion Rule (5-D) is performed."

The proposal of the railroad was accepted by the Brotherhood only in part, and all reference to the re-arrangement of assignments was deleted. And while the apparent significance of proposal and counterproposal of parties engaged in the continuing and repetitive technique of collective bargaining may not always be reliable as a complete reflection of the parties' intent, we are satisfied in the case at bar that the history of Article 64 is ample support for the court's conclusion as to the article's proper interpretation. Certain it is that the railroad's contention that its change from a straight-away to a turn-around run established a new run or assignment, specifically authorized by Article 64, is both strained and unpersuasive.

Subsection First (p) of 45 U.S.C. § 153 provides that the suit in the District Court "shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ." Although the Board order awards to the individual appellants a full day's pay for each claim filed, both the findings and the order of the Board make no mention of the basis for the amount of the award. And since the parties have stipulated that the aggrieved employees have suffered no actual monetary loss or hardship from the contract violation, both the weight of the Board order as evidence of fact and the presumptive correctness of the Board order, Elgin, Joliet & Eastern Ry. v. Burley, 327 U.S. 661, are completely dissipated. The District Court, then proceeding as in "other civil suits," limited the award to nominal damages and refused enforcement of the Board order to a greater extent.

The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act. See Priebe & Sons v. United States, 332 U.S. 407, 413. And if, as counsel for the Brotherhood contends,[1] there exists within the industry a long established and accepted custom to pay what would amount to a windfall for contract violations such as here occurred, such custom was not established by finding, nor requested as a finding, in the procedures before either the Board or the District Court. We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach or an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Atlantic Coast Line R.R. v. Brotherhood of Ry. Clerks, 4 Cir., 210 F. 2d 812, 815; United Protective Workers v. Ford Motor Co., 7 Cir., 223 F. 2d 49, 53-54. Absent actual loss, recover is properly limited to nominal damages. Oklahoma Natural Gas. Corp. v. Municipal Gas Co., 10 Cir., 113 F. 2d 308; Norwood Lumber Corp. v. McKean, 3 Cir., 153 F 2d 753; 5 Williston, Contracts (rev. ed.) § 1339A.

The judgment is affirmed. Each party shall bear its own costs.

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[1] Counsel states that a review of awards of the National Railroad Adjustment Board as of September 18, 1963, indicates that "there are more than 1,000 cases involving railroads throughout the United States, in which a carrier has been required to pay a basic day's pay for a violation of a contract provision although the contract did not contain any provision for punitive damages or penalties. At least 110 of these awards involved the D&RGW." We have not, of course, made such a review. However, we find no statement in any of the awards to which we have been specifically referred that indicates the alleged custom to have been established as a fact. And, indeed, several of the awards hold that actual loss is a prerequisite to an award.

APPENDIX C

Section 3, First (i) through (q) of the Railway Labor Act (45 U.S.C.A., Sections 153, First (i) through (q))

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division member, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select

a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such orderer, the petitioner, or any person for whose benefit such order was made, may file in the District Court of

the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board and not after.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILROAD TRAINMEN, et al.,
Petitioners

VS.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 847

BROTHERHOOD OF RAILROAD TRAINMEN, et al.,
Petitioners

VS.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent Denver and Rio Grande Western Railroad Company opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in that Court's case No. 7651.[1] However, simultaneously with the filing of this brief in opposition, respondent is filing a conditional cross-petition for a writ of certiorari in that Court's companion case No. 7652,[2] in the event that certiorari should be granted in case No. 7651.

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[1] Case No. 7651 involved the measure of damages to be imposed for a contractual violation in the absence of any injury.

[2] Case No. 7652 involved the question whether there had been any breach of contract.

Opinion Below

The opinion of the court of appeals appears in 338 F.2d 407 (Pet. 2a-6a). The district court rendered no opinion; its Findings of Fact, Conclusions of Law and judgment (R. 36-46) are unreported.

Jurisdiction

The judgment of the court of appeals was entered on November 19, 1964 (Pet. 1a). The jurisdiction of this Court has been invoked under Section 1254(1) of the Judicial Code (28 USC § 1254(1)).

Question Presented

If Article 64 of the collective bargaining agreement between the parties was violated by the Rio Grande, were petitioners entitled to nominal damages or payment of an additional day's pay for each day of violation, in the absence of any damage to petitioners and in the absence of any applicable penalty clause in the agreement?

Statute and Contractual Provisions Involved

Section 3 First (p) of the Railway Labor Act provides (45 USC § 153 First (p)):

> (p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. *Such suit* in the District Court of the United States *shall proceed in all respects as other civil suits*, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the *facts* therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board. (Emphasis supplied.)

Article 6 of the collective bargaining agreement between the parties provides:

> BASIC DAY—FREIGHT SERVICE
>
> (a) In all road service except passenger service, 100 miles or less, 8 hours or less (straight-way or turn-around) shall constitute a day's work. Miles in excess of miles required for a minimum day will be paid at the mileage rate provided.
>
> (b) On runs of 100 miles or less, overtime will begin at the expiration of eight hours; on runs of over 100 miles, overtime will begin when the time on duty exceeds the miles run divided by 12½. Overtime shall be paid on the minute basis at three-sixteenths of the daily rate per hour.
>
> (c) Road trainmen performing more than one class of road service in a day or trip will be paid for the entire service at the highest rate applicable to any class of service performed. The overtime basis for the rate paid will apply for the entire trip.

Article 13 of the collective bargaining agreement provides:

RUN-AROUNDS—ALLOWANCE FOR

(a) Crews, except those assigned to regular runs, will be called first in, first out. When called out of turn, except as provided above, the crew due first out and runaround will be allowed one day's pay and placed at the foot of the list at time of call.

(b) An individual trainman runaround will be allowed one day's pay.

Prior to May 1, 1945, Article 64 of the agreement provided:

ESTABLISHING NEW RUNS

In establishing new runs the proper general officer will notify the General Chairman of the Brotherhood of Railroad Trainmen and negotiate rates and conditions to cover the service. This rule not to prevent the Railroad taking care of the demands of the service.

In 1945, Article 64 was amended to provide:

ESTABLISHING NEW RUNS

The Company is not prohibited by any Article or provision of this Agreement from establishing new runs, or new assignments. Notices calling for bids on any new run or new assignment must state definite limits and must show number of days per week (6 or 7) to be worked and time crew will go on duty.

Rates of pay for any new run or new assignment will be in accordance with rates for similar assignments on the same Sub-Division. If no similar assignment on the same Sub-Division, rates of pay will be a matter of negotiation between the designated General Officer and General Chairman of the Brotherhood of Railroad Trainmen.

NOTE: Time for crews to go on duty will not be changed without at least 48 hours' notice. When time to go on duty is changed one (1) hour or more the assignment will be rebulletined.

Statement

This is a suit to enforce Award No. 19372 of the National Railroad Adjustment Board, First Division, dated December 17, 1959 (R. 1-7, 68-92). In proceedings to enforce such awards, the statute provides that the findings and orders of the Board "shall be *prima facie* evidence of the *facts* therein stated." Railway Labor Act, Section 3 First (p) (45 U.S.C. § 153 First (p); emphasis supplied). The facts in the present case are undisputed and were stipulated by the parties (R. 21-35).

Prior to March 6, 1952, the Rio Grande operated a Tintic Branch run between Provo and Eureka, Utah, to which one train crew was assigned. The distance between the two terminals was about 45 miles. The rate of pay for this run was listed in Article 5(c) of the collective bargaining agreement between the Rio Grande and the Brotherhood of Railroad Trainmen. The crew assigned to the run operated out of Provo on Mondays, Wednesdays and Fridays and out of Eureka on Tuesdays, Thursdays and Saturdays. (R. 37, 80.) On March 6, 1952, the Rio Grande notified petitioner Trainmen that the foregoing straight-away assignment would be changed to a daily turnaround run operating over the same territory, with the same rates of pay. New diesel engines made the turnaround possible. Both the old and new assignments were for six days a week. The same number of employees was required on the new assignment. (R. 37-38.) The difference between the two assignments was that the crew now returned to Provo, its home terminal, every evening, whereas formerly three nights a week were spent at Eureka where the crew slept in a caboose (R. 68, 105).

The reference to the Provo-Eureka run in Article 5(c) did not prescribe whether the run was to be operated as a straight-away or turnaround run, and nothing was changed with respect to the description of the Provo-Eureka run in that Article (R. 93-96, 59-60, 101). Since ore-loading business at Eureka had disappeared, under the new assignment the trains from Provo ordinarily ran only 9.1 miles to Spanish Forks, or 21.3 miles to the half-way point of Keigley (R. 56, 57, 90, 104). Petitioners have stipulated that they suffered no loss of wages or hardship from the new assignment (R. 25, 35; see also R. 56, 100).

The claimants in this case are brakemen who bid for and received jobs on the new turnaround run (R. 2, 6, 99). They were all paid at least a day's pay on the days for which claims were filed (R. 44, 100). Their theory is that they should be allowed an additional day's pay as a penalty, because the Rio Grande, they concluded, had no right to change the Provo-Eureka run to a turnaround without prior approval from the Trainmen (R. 33, 68-69, 100). Even though petitioners admit that they "sustained no loss of services or hardship by reason of [Rio Grande] respondent's action" (R. 35), they nevertheless claim they are entitled to two days' pay for each day of work on the new run (Pet. 14, 19, 27).

Before 1945 the collective bargaining agreement between the Rio Grande and the Trainmen required the Rio Grande to negotiate with the Trainmen "In establishing new runs * * *" (R. 29). However, in May 1945, Article 64 of the Agreement was revised to provide that the Rio Grande was not prohibited "from establishing new runs, or new assignments" without negotiating with the Trainmen (R. 24). Prior and subsequent to the 1945 promulgation of Article 64 in the collective bargaining agreement, the Rio Grande cancelled many of the runs listed in Article 5(c) thereof by

giving notice to the crews but without negotiation with the Trainmen. Some of the runs cancelled were because of abandonment approved by the appropriate Governmental agency, but many of the cancelled runs did not involve track abandonment. Apart from the present case, the Trainmen did not assert that the Rio Grande violated the 1952 collective bargaining agreement by such cancellations. (R. 60-61, 65.) Railroad-union collective bargaining contracts do not customarily contain clauses expressly reserving to management the right to abolish runs (R. 61).

Because, as usual, the ten members of the First Division of the Adjustment Board were evenly divided, the National Mediation Board, pursuant to Section 3 First (1) of the Railway Labor Act (45 U.S.C. § 153 First (1)), appointed a referee to decide this dispute (R. 43). In Award No. 19372 the referee concluded that the Rio Grande's action had violated Article 64 of the collective bargaining agreement between the parties, and he awarded one day's penalty pay for each day specified in the claims (R. 91-92, 7-8).

The Rio Grande considered Award No. 19372 to be erroneous and therefore refused to comply with the money award therein. Although the Provo-Eureka straight-away run has not been restored, the Trainmen are no longer accruing claims, by virtue of a settlement reached in 1960. (R. 31, 43.) This suit seeks to enforce the money award contained in Award No. 19372 (R. 31, 33, 43, 96-98).

The district court and court of appeals agreed with the referee that there had been a violation of Article 64, but held that in the absence of any actual damages, only nominal damages of $1.00 per day should be awarded to the claimants for the alleged breach of the collective bargaining contract (R. 44-45; Pet. 3a, 6a).

Petitioners are seeking a writ of certiorari insofar as they were denied a full day's penalty pay (Pet. 23-28). Believing

that the judgment below was correct in this respect, the Rio Grande is opposing certiorari. However, simultaneously with its brief in opposition, the Rio Grande is filing a conditional cross-petition for certiorari with respect to the holding below that the Rio Grande violated the collective bargaining contract, in the event that certiorari should be granted herein.

ARGUMENT

1. The petition does not present any question meriting the attention of this Court. Because this case involved the "interpretation or application" of an agreement (Section 3 First (i) of the Railway Labor Act (45 USC § 153 First (i)), both courts below applied the normal rule of contract law that it was improper to award petitioners an additional day's penalty pay for a supposed contractual violation in the conceded absence of any damage and any penalty clause. This contract rule is so well settled that it needs no further examination here. Under Section 3 First (p) of the Railway Labor Act (*supra*, pp. 2-3), enforcement suits are to "proceed in all respects as other civil suits." The findings and order of the National Railroad Adjustment Board are merely "prima facie evidence of the facts." Therefore, in enforcement suits, trials *de novo* are required. See *Brotherhood of Railroad Trainmen* v. *Louisville & Nashville R. Co.*, 334 F. 2d 79, 81, 82 (C.A. 5, 1964), certiorari denied, 379 U. S. 934; *Russ* v. *Southern Ry. Co.*, 334 F. 2d 224, 227 (C.A. 6, 1964), certiorari denied, 33 U. S. Law Week 3252; *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 243, 244, 250 (C.A. D.C., 1941), affirmed by an equally divided Court, 319 U. S. 732. Accordingly, the courts below were not required to follow Referee Sembower's unexplained order granting petitioners a full day's penalty pay even though they had suffered no damage or other hardship (R. 91-92).

The district court's findings that "Earnings of petitioners were * * * not reduced and [that] no additional hardships were imposed upon them by the new assignment" (R. 44; see also R. 25-35) are unchallenged. In these circumstances and in the absence of any "flagrant and deliberate violations" of this collective bargaining agreement (cf. Pet. 15), to award petitioners an additional full day's pay would be imposing sanctions or penalties against the Rio Grande. However, the Railway Adjustment Act does not empower the Adjustment Board to impose sanctions or penalties and such a power cannot be inferred. See *Priebe & Sons* v *United States*, 332 U. S. 407, 413; *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 11-13.

As stated above, all enforcement suits in the district court are to proceed as other civil suits; therefore the reviewing court of appeals was bound by the "clearly erroneous" rule. Rule 52(a) of the Federal Rules of Civil Procedure; *Russ* v. *Southern Ry. Co.*, 334 F. 2d 224, 227 (C.A. 6, 1964), certiorari denied, 33 U. S. Law Week 3252. Affirmance was clearly justified. Petitioners' statement that the Adjustment Board regularly awards a full day's penalty pay for contractual violation when employees have, as here, been uninjured is simply untrue (cf. Pet. 16, 28). The court below stated that:

> We find no statement in any of the awards to which we have been specifically referred [by Trainmen] that indicates the alleged custom to have been established as a fact. And, indeed, several of the awards hold that actual loss is a prerequisite to an award. (Pet. 6a, note 1.)

Even the four awards upon which petitioners rely (Pet. 16-21) do not stand for petitioners' proposition. Thus in First Division Awards 3122, 16961, 17600 and 19258, the carrier had required employees to do extra work or work outside

their crafts.[3] Here, under the new assignment, the trains from Provo ordinarily ran only 9.1 miles to Spanish Forks or 21.3 miles to the halfway point of Keigley, instead of the former 45 miles distance from Provo to Eureka (R. 56, 57, 90, 104). The employees were now able to sleep in their homes in Provo instead of in a caboose in Eureka (R. 68, 105). There is no claim that the petitioners were required to do any work outside their crafts or were not fully compensated for their work.

This Court should note too that none of the awards on which Trainmen rely have withstood the scrutiny of judicial review, nor do they even constitute precedent in the Adjustment Board itself (R. 61). See "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chi. L. Rev. 303, 310 (195_); Attorney General's Committee on Administrative Procedure, Monograph No. 17, p. 41 (1940). Inconsistency of awards is one of the hallmarks of the Adjustment Board. One of the reasons is that the cases are actually decided by referees who frequently have had no experience or familiarity with the railroad world. Northrup and Kahn, "Railroad Grievance Machinery: A Critical Analysis," 5 Industrial and Labor Relations Review 365, 376-378, 555 (1952); "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chi. L. Rev. 303, 310, 320 (1951).

Contrary to petitioners' assertion, many Adjustment Board awards hold that claimants must show loss of earnings or injury arising from a contract violation in order to support claims for additional pay. See, for example, First Division Awards 5080, 5120, 5396; 6716, 12646, 14099, 16137, 16264, 16507, 19496 and 19985. As recently stated by the Adjustment Board:

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[3] For the same reasons, the awards collected in Note 5 (Pet. 16-17) are inapplicable.

> * * * the law of contracts governs the Board's adjudication of a dispute. The law of contracts limits a monetary Award to proven damages actually incurred due to a violation of the contract * * *.
>
> * * * the National Railroad Adjustment Board may not impose a penalty, unless expressly provided for in a collective bargaining contract[4] * * *.
>
> * * * * *
>
> There is no evidence in the record that any Employee * * * suffered any loss of pay because of Carrier's violation of the contract. * * * Therefore, for this Board to make an Award as prayed for in Parts (2) and (3) of the Claim would be imposing a penalty on the Carrier and giving the MW Employees a windfall—neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of the Board. (Third Division Award No. 10963 at p. 16.)

To the same effect, see Third Division Awards 10730, 11881 and 13092.

Trainmen's authorities for the award of penalties include three Rio Grande awards in which the Board did *not* sustain monetary claims even though the carrier may have violated the agreement! Thus in Awards 2310, 2311 and 2312, incorrectly stated at Pet. 19, the Board actually held that the cases should be disposed of by negotiation or arbitration and the claims were not paid. Award 2352 (*ibid.*) did not involve a day's penalty pay but claims for 21¢ and 18¢ for 15 minutes' switching work at Green River under Article 15 of the Roadmen's Schedule. Awards 2604 and 2606 (*ibid.*) did not involve Article 64 of its predecessor. Awards 2603 and 2607 (*ibid.*) involved the earlier version of Article 64

---

[4] Trainmen do not assert that any penalty provision in the contract applies here (Pet. 14). The contract contained no penalty clause (R. 63).

that required negotiation over "establishing new runs" (R. 29). Thus Trainmen's attempt to prove a long established practice on the Rio Grande is refuted simply by an examination of the eight Rio Grande awards cited by Trainmen themselves (Pet. 19).

As the court below noted, the pertinent part of "The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations" (Pet. 6a). The only penalty clause in this contract is contained in Article 13 *supra*, p. 4, and relates to crews called out of turn (see R. 63). Here there was no contention that petitioners worked in excess of 100 miles or in excess of eight hours, and Article 6, the basic day rule, expressly provides that they should accordingly only receive pay for one day's work, whether "straight-way or turn-around" (*supra*, p. 3).

Trainmen's chief reliance is on *dicta* in *Shipley* v. *Pittsburgh & Lake Erie R. Co.*, 83 F. Supp. 722, 749 (W.D. Pa., 1949) (Pet. 22, 27). There the court refused to award an additional day's pay to claimant trainmen. The Court observed that if a carrier required employees to do extra work, the employees might be entitled to an additional day's pay upon proof that the parties so intended. Here there was no such proof (R. 69-79, 90-91). Moreover, the instant claimants were not required to do any additional work. They bid for the new turnaround assignment (R. 25) and the straight-away assignment was abolished (R. 26). It is agreed that they received the same rate of pay and sustained no loss of wages (R. 25, 35). Thus the situation in the *Shipley* case, where the trainmen complained that they were required to do the extra work of coupling air hoses, does not prevail here.

Moreover, in the *Shipley* case the court explained the basic day rule (Article 6, supra, p. 3) as follows (at p. 736):

> The underlying theory of the rule is that if, during the course of a day's tour of duty, a trainman does work both in and out of his craft, he is working under two contracts and is entitled to be paid under both contracts. He is, therefore, entitled to sixteen (16) hours' pay even though he worked but one hour (or one minute) under the contract outside his *craft*. It is, therefore, an incident and aids in making possible the preservation of the *craft* system.
>
> The reasoning behind the rule was that if the employees would perform their duties in less than a given period of time, or hours, they would be paid their full day's pay. That *when their work was completed* if they were assigned to perform *additional work*, they would receive an additional day's pay for so doing. (Emphasis supplied.)

Here since there was no contention that petitioners were required to do any work outside their craft or any additional work, they cannot recover for a second day's pay under the basic day rule.

Petitioners also rely on the Rio Grande's practice of paying some claims for contractual violations (Pet. 22). However, in the *Shipley* case, the court observed that railroads have often paid awards they considered erroneous because of the fear of strikes. Consequently, there the court refused to treat as precedents any past payments under the basic day rule (83 F. Supp. at pp. 760-762). Here, too, the testimony shows that under strike threats, the Rio Grande complied with many erroneous awards (R. 62) until it was decided that enforcement suits were the exclusive remedy to enforce Adjustment Board awards. *Brotherhood of Railroad Trainmen* v. *Denver & Rio Grande Western R. Co.*, 290 F. 2d 266 (C.A. 10, 1961), certiorari denied, 366 U. S. 966; *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U. S. 33.

2. The court below correctly held that this case was governed by the general law of damages relating to contracts. The case was not decided on "strict common law principles" (cf. Pet. 26, 27), but on well settled contract law principles that aggrieved parties are only to be put in the same position as if the contract had been performed. *Priebe & Sons* v. *United States*, 332 U. S. 407, 413; *United Protective Workers* v. *Ford Motor Company*, 223 F. 2d 49, 53, 54 (C.A. 7, 1955); *Odell* v. *Humble Oil & Refining Co.*, 201 F. 2d 123, 128 (C.A. 10, 1953), certiorari denied, 345 U. S. 941; *Buster* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 195 F. 2d 73, 76 (C.A. 7, 1952); *Hanson* v. *Chesapeake & Ohio Ry. Co.*, 198 F. Supp. 325, 332 (S.D. W.Va., 1961); *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810, 815 (S.D. Ia., 1936); *Russell* v. *Ogden Union Ry. & Depot Co.*, 122 Utah 107, 247 P. 2d 257, 263 (1952); Restatement, Contracts, § 339; 5 Williston, Contracts (rev. ed.) §§ 1339A, 1358.

Respondent agrees that the National Railroad Adjustment Board can impose damages for losses actually incurred by employees injured by the breach of an agreement. Here petitioners were not injured and indeed have stipulated that they suffered no hardship or monetary loss from the new assignment (R. 35).

As in all enforcement suits brought to date, the courts below were required to "proceed in all respects as [in] other civil suits" and to apply "the rules of the court governing actions at law." Section 3 First (p) of the Railway Labor Act (145 USC § 153 First (p)), *supra*, pp. 2-3. Petitioners have cited no cases to show that the application by the courts below of the general law of damages relating to contracts (Pet. 6a; R. 44-45) was erroneous. The cases are all the other way, thus highlighting the absence of any conflict of decisions.

Trainmen have given a myopic reading to the record before the Adjustment Board in an effort to show the penalty point was not raised there (Pet. 27-28). A fair-minded reading of the record shows that the point was adequately raised there (R. 85, 89). In addition, the Rio Grande's Adjustment Board brief stated (at p. 13):

> * * * it is obvious that this claim is nothing but an attempt to seek two days' pay for a properly paid day's work * * *.

That is the very point that was reargued to the courts below (R. 63-64, 100, 101; Transcript of July 17, 1963, pp. 68-75, 76, 83-87; Pet. 5a-6a).

CONCLUSION

The decision below is correct and represents no departure from settled principles of contract law. There is no conflict alleged among the decisions of the courts of appeals, and there is no conflict among other decisions. This case involves a question of contract interpretation. The resolution of such a question would settle nothing but the rights of the parties to this particular litigation, and those rights have already been fully considered by two courts below. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 937

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILROAD TRAINMEN, et al.,
Petitioners

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF PETITIONERS IN REPLY TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF PETITIONERS IN REPLY TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

Now come the petitioners in the above-entitled cause to reply to the brief of the respondent The Denver and Rio Grande Western Railroad Company in opposition to the petition for a writ of certiorari.

Respondent's sole argument in opposition to the petition is that the Court of Appeals correctly held that the National Railroad Adjustment Board is limited by

common-law principles governing the award of damages in sustaining monetary claims of railroad employees in situations where a carrier has violated a collective bargaining agreement governing the rates of pay, rules, and working conditions of the employees involved. However, the present case involves the first instance in which a Court of Appeals has laid down such a sweeping limitation upon the statutory authority of the Adjustment Board.[1] Respondent's brief completely ignores the importance of the issues presented with respect to the authority of the Adjustment Board and that agency's ability to rectify and prevent violations of collective bargaining agreements. It also ignores the inconsistency between the decision below and this Court's holdings that Section 3 of the Railway Labor Act establishes a unique system of compulsory arbitration and that rights under collective bargaining agreements are not to be determined upon the basis of principles of law governing ordinary contracts. These are all factors giving rise to a situation requiring a review by this Court of the judgment below.

This Court only recently recognized the importance of and the need to review decisions of lower Federal courts restricting the jurisdiction and functions of the National Railroad Adjustment Board when it granted the petition for certiorari in *Gunther* v. *San Diego and Arizona Eastern Railway Company* (Case No. 733, petition for certiorari granted March 1, 1965). The decision of the Court of Appeals for which review is

[1] Respondent cites (page 14) only two District Court decisions involving suits to enforce Adjustment Board awards in support of its position. In neither one of these (*Hanson* v. *C & O* and *Cook* v. *Des Moines Union Ry.*) was the issue here involved squarely presented and passed upon. Respondent simply relies upon language in the two decisions.

here sought is even more sweeping in its effect upon the authority of the Adjustment Board and rights of employees than was the decision below in the *Gunther* case. Already railroads are taking advantage of this decision to contend to the Adjustment Board that they are relieved of financial obligations to employees even though they may have deliberately violated a collective bargaining agreement and instructions have begun to be issued by railroads to their labor relations departments to apply the decision below in all of their dealings with employees. This situation urgently calls for review by this Court of the decision below limiting the authority of the National Railroad Adjustment Board.

Respectfully submitted,

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April, 1965